

82-1617

No. A-697

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ALEXANDER L. STEVAS,
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

MICHAEL JOHN NITZ,
Petitioner,

v.

STATE OF IOWA,
Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF IOWA**

JAMES M. HOOD
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Davenport, Iowa 52801
(319) 323-5255
Attorney for Petitioner

QUESTION PRESENTED

The question presented:

1. Defendant did not have effective assistance of counsel at trial and therefore is entitled to a new trial because his counsel did not call an expert witness on the effects of alcohol.

PARTIES IN THE COURT BELOW

This is a state criminal prosecution. The State of Iowa was the Plaintiff in the Trial Court and Appellee before the Supreme Court of Iowa, while Michael John Nitz was the Defendant in the Trial Court, and the Appellant before the Iowa Supreme Court. There are no other parties.

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**PETITION FOR WRIT OF CERTIORARI
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OPINION BELOW

Petitioner was convicted of the offense of Assault without Intent to Inflict Serious Injury. His sole defense was intoxication. His trial counsel, Jose Olvera, did not call an expert witness on the effects of intoxication. The Iowa Supreme Court refused to address the merits of Petitioner's claim of ineffective assistance of counsel because they felt the record was insufficient.

JURISDICTION

Petitioner was the Appellant before the Iowa Supreme Court. The Court's opinion was entered on January 3, 1983. Petitioner did not request a rehearing. On February 17, 1983, the Supreme Court of the United States granted Petitioner until April 3, 1983, to file his Petition for Writ of Certiorari. This Court's jurisdiction is invoked pursuant to 28 U.S.C., Section 1257(1) and (2).

CONSTITUTIONAL PROVISIONS

1. Constitution of the United States, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

On December 19, 1981, Petitioner was charged with Willful Injury and Attempted Murder, and entered a plea of not guilty. Prior to trial, the Muscatine District Court dismissed the charge of attempted murder. On March 16, 1982, the case proceeded to trial, and the jury returned a verdict finding Mr. Nitz guilty of the offense of Assault without Intent to Inflict Serious Injury. On May 3, 1982, Petitioner was sentenced to a period of one year on the convicted charge. Thereafter, he filed a Notice of Appeal to the Iowa Supreme Court, which affirmed the Trial Court and refused to grant him a new trial.

On December 19, 1982, Petitioner consumed a large quantity of alcoholic beverages and became intoxicated. He met the victim, Douglas Ashley, at a tavern in Blue Grass, Iowa, and they traveled to Petitioner's trailer in Blue Grass, Iowa with Luann Sims. While in the trailer and for no apparent reason, Petitioner shot Douglas Ashley in the leg with a shotgun. Petitioner could remember events before his drinking, but could remember little of the actual shooting due to the effects of his drinking. Petitioner testified to having "blacked out" because of his drinking. He could not remember what occurred on the evening of the shooting.

Petitioner acknowledged at trial that he shot Douglas Ashley, but could not state why he shot him. Petitioner's

defense was based on intoxication. Yet, no expert witness was called to explain the effect of alcohol in causing the "black out", or to explain Petitioner's conduct.

Petitioner was represented by attorney, Jose Olvera, at the trial. On appeal before the Iowa Supreme Court, Petitioner's appellant counsel, John P. Harris, first raised the issue of ineffective assistance of counsel for failing to call an expert witness on the effects of alcohol on the body. The federal question of ineffective assistance of counsel was first raised in Petitioner's appellant brief. The Iowa Supreme Court ruled that the record was insufficient to address the merits of Petitioner's claim for ineffective assistance of counsel.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

The Sixth Amendment to the United States Constitution mandates a criminal defendant shall enjoy the right to effective assistance of counsel for his defense. This guarantee was first interpreted by the Supreme Court to mean the effective assistance of counsel in *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L. ED. 158 (1932). In *McMann v. Richardson*, 397, U.S. 759, 90 S.Ct. 1441, 25 L. ED 2nd 763 (1970), the Supreme Court stated that "it has long since been recognized that the right to counsel is the right to effective assistance of counsel".

In *United States v. Weir*, 657 F.2d 1005 (CA Iowa, 1981), the Court held that the decision to not call an expert witness could be ineffective assistance of counsel if it resulted in the failure to exercise the customary skill and diligence that reasonably competent attorneys would exercise under similar circumstances, and that Defendant was prejudiced thereby.

Since Petitioner's sole defense was intoxication, it was imperative that the effects of alcohol be explained to the jury. Defense counsel only called Petitioner to testify on

the effects of alcohol. An expert witness would have aided Petitioner's case and defense counsel's failure to use an expert witness damaged Petitioner's case and rendered counsel's assistance ineffective.

CONCLUSION

Petitioner respectfully requests that the Court grant its Petition for Certiorari and grant him a new trial due to ineffective assistance of counsel.

Respectfully submitted,

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*Attorney for Petitioner,
Michael John Nitz*

April 1, 1983

1a

APPENDIX

IN THE SUPREME COURT OF IOWA

444
68493

STATE OF IOWA,

Appellee,

vs.

MICHAEL JOHN NITZ,

Appellant.

Filed January 3, 1983

Appeal from Muscatine District Court
R. K. Stohr, Judge

Appeal by defendant from conviction by jury and sentence for assault with intent to inflict serious injury. AFFIRMED.

John P. Harris of Gomez, May, Pries & Harris, Davenport, for appellant.

Thomas J. Miller, Attorney General, Steven M. Foritano, Assistant Attorney General, and Stephen J. Petersen, County Attorney for appellee.

Considered by McCormick, P.J., and Larson and Carter, JJ.

PER CURIAM.

The trial court did not abuse its discretion in overruling defendant's objection to the rebuttal evidence, which was offered to dispute defendant's evidence on the issue of specific intent. Nor did the court abuse its discretion in overruling defendant's motion for mistrial based on the prosecutor's conduct in calling an absent rebuttal witness

to testify when he had no reason to believe the witness was present. Assuming the event constituted misconduct, defendant's theory of prejudice is simply too tenuous to establish error in the ruling. The record is insufficient to address the merits of defendant's claim of ineffective assistance of counsel, and our disposition of this case reserves his right to repeat that claim in a postconviction action.

AFFIRMED.